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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. 5485

ROBERT JOHNSON ..... Petitioner

V.

STATE OF MISSISSIPPI ..... Respondent

BRIEF FOR THE RESPONDENT

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ARGUMENT

For purposes of this appeal the facts of this case, except inferences to be drawn therefrom, are fairly stated in the Petition and the Brief for Petitioner.

Respondent has no argument with the rationale of the authorities cited by Petitioner, but submits that the procedure in Mississippi for review on appeal of contempt convictions supplies a complete answer to the contention of Petitioner. Attached hereto as an Appendix is a copy of an Opinion of the Mississippi Supreme Court in the case of *Shattuck v. State,* decided in 1875 and found in 51 Miss. at page 50. *Shattuck* refers to the case of *Watson v. Williams,* 31 Miss. 331, decided in 1858, and that part of the Opinion beginning at page 341 of 31 Miss. is also appended hereto. In these cases there is a thorough discussion of the law with respect to contempt of court to the effect that only the contemned court can make the finding of contempt, and there is no appeal from that finding nor any collateral review. These cases reflect the law with respect to contempt as

it then stood in England and in this country. It is readily apparent in the present enlightened age that such power in the hands of one judge could lead to many injquities and the venting of personal spleen at the whim of such a judge. Undoubtedly the Mississippi Legislature realized this and by what is Section 2316 of the Mississippi Code of 1880, now appearing as Section 1452 of the Mississippi Code 1942, Recompiled, provided for an appeal, as was had in this case, to the Supreme Court of Mississippi, and to be tried on the record. There is no known source from which to verify or determine what prompted this action by the Mississippi Legislature as early as 1880. It is obvious that the enactment of this statute was to prevent any iniquities inherent in the contempt power of a single judge and provides a dispassionate review of any such judge's actions by determining from the cold printed record on appeal whether or not a contempt had been committed. This statute provides that on appeal from a contempt conviction the appellate court shall determine "[W]hether the appellant was guilty of contempt; and the sentence or decree or order of the court below may be *affirmed, reversed, annulled, or modified, according to the judgment of the appellate court.*" [Emphasis Added]

It is respectfully submitted that this provision in the Mississippi Law accomplishes the same purpose as having a judge other than the one contemned to hear the matter at the trial level. As a matter of fact, the alleged contemnor is protected by the requirements that the majority of the members of the Supreme Court find him in contempt. To show this Court that the Mississippi Supreme Court does as it should in the protection of one found guilty of contempt, there is also appended hereto a copy of an Opinion of that Court in *Boydstun*

v. State of Mississippi, number 46,257, decided recently but not yet reported.

CONCLUSION

Wherefore, it is respectfully submitted that in view of the provisions of Section 1152 of the Mississippi Code 1942 Recompiled, as applied by the Mississippi Supreme Court, one found in contempt is better protected than he would be if another single judge heard the evidence below and made a finding thereon.

Respectfully submitted,

A. F. SUMMER, ATTORNEY GENERAL

By:

G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day, March 19, 1971, A. D., mailed five copies of the foregoing Brief and Appendices each to Honorable Stephen W. Porter and Honorable Richard B. Ruge, Attorneys for Petitioner, at their usual Post Office address in Washington, D. C.

ASSISTANT ATTORNEY GENERAL

APPENDIX A

A. A. Shattuck vs. The State.

1. Contempts: *Power to punish therefor.*

   Power to punish for contempts is inherent in all courts, especially those of superior cognizance. This is essential to the preservation of order and the proper discharge of the judicial functions.

2. Same: *Power of court to review for contempt.*

   One court cannot review a contempt committed against another court, nor can a judge discharge a prisoner upon *habeas corpus,* committed for a contempt of another court.

3. Same: Same.

   Although jurisdiction does not belong to an appellate court to review a judgment for contempt, yet, if the contempt complained of was not committed in the presence of the court, but was for the disregard of its process or disobedience of its precept, common justice demands that the offender should have an opportunity to purge himself of the offense. The usual practice being to serve a rule on the party to show cause, etc.

4. Same: *Attachment.*

   If the respondent fails to make a true return on the writ of *habeas corpus,* an attachment is the proper process to bring the party into court to answer for the contempt.

Error to the Circuit Court of *Lee* County.

Hon. B. B. Boone, Judge.

The facts in this case are very fully stated in the opinion of the court.

The only question considered by the court being, whether it had jurisdiction of such cases. It is unnecessary to enumerate the various assignment of errors.

1. The writ of *Habeas corpus* does not show that it was issued by the officer appointed by the *fiat* of the judge to issue it.

2. The writ of *habeas corpus* was not made returnable within a reasonable time.

3. Final judgment was entered against the appellant, A. A. Shattuck, in the first instance, and without notice to him.

4. Said judgment was based on the *ex parte* affidavits of the attorneys for D. L. Low, the relator, a mode of trial unknown to law and not "by due course of law," repugnant to our constitution, and before any papers in the *habeas corpus* case had been filed in court.

5. Said judgment was rendered in the absence of this appellant.

6. The affidavits of F. S. White, S. M. Meek and L. F. Bradshaw, show that the relator was not in the custody of this appellant.

7. Said affidavits show that if any contempt of the process of the court occurred, it was committed by J. W. Sanders, the jailer of Colfax county, and a party cannot be guilty of contempt by proxy.

8. Said affidavits show that J. H. Shipman, the deputy sheriff of Shattuck, attempted to execute said writ, but was prevented by said jailer.

9. Said affidavits do not show that A. A. Shattuck failed to execute said writ.

10. Said affidavits show that H. B. Whitfield, the district attorney of the seventh judicial district, in which the relator was imprisoned, had forbidden the removal of Low by this appellant.

11. The record shows no notice of this *habeas corpus* proceeding; was issued to or served on the district attorney in whose district the relator was imprisoned.

12. The coroner's return shows that this appellant was, at the time of said alleged contempt, at his home confined to his bed by severe sickness.

13. The record shows that A. A. Shattuck was not summoned to appear and show cause against the said fine of $500 being made final.

14. The record shows that A. A. Shattuck never was under the jurisdiction of the court to abide its judgment or for any other cause.

15. The record shows that Shattuck was never present before said court, but was sick in bed, and that he was not allowed time nor opportunity to make any defense, but was peremptorily and summarily punished without hearing or trial.

16. A. A. Shattuck has never had his day in court.

17. The record shows that said *habeas corpus* trial was had in vacation, and not before any regular court, and that execution was ordered to issue for said fine, instead of an order that appellant stand committed.

18. The record shows that said *habeas corpus* trial was had in vacation, and not before any regular court, and that execution was ordered to issue for said fine, returnable to the circuit court of Lee county at its regular term, instead of to Chickasaw county.

19. The record shows that the alias writ of *habeas corpus* was issued by the chancery clerk of Lee county.

20. The writ of attachment against Shattuck was issued by the chancery clerk of Lee county, who had no authority, the circuit clerk being the clerk of the court.

Flaniken & Beckett, for plaintiff in error:

Construction of the law. Black. Com., 59, 60, §§ 3, 4 and 5; Code, 1871, § 1415; see also §§ 1409, 1412, 1415; 38 Miss., 331. The judgment is void. 1 S. & M., 351; 4 id., 751; 41 Miss., 49 and 668; 10 S. & M., 159; 3 id., 529; 4 id., 538 and 549; 1 id., 521 and 584; 5 id., 559; 7 id., 85, 127 and 449; 9 id., 613. The proceedings must be legal or the high court will interfere. Const., art. I, §§ 2 and 7; 4 S. & M., 778; 10 id., 103; 4 How., 401; 7 id., 127; 35 Miss., 383; 2 J. J. Marsh., 275; 4 Paige, 378; 1 Va. cases, 330; 1 Scam., 440; 2 Sand., 724; Co. on Lit., 288; 3 Scam., 402; 6 Johns., 335; 1 Hill, 139; 6 Cow., 381. The court had but limited or special jurisdiction. Code, 1871, §§ 1400 and 1408. Not generally reviewable, but at discretion. 4 S. & M., 778; 13 id., 302; 41 Miss., 404; 43 id., 373; 37 id., 605. The judgment *nisi* was void for want of notice. 35 Miss., 382; 31 id., 133; 3 Cush., 883; 1 S. & M., 521; 7 id., 85; 9 id., 613; Code, 1871, §§ 225, 226, 286, 700, 2250 and 2253. The judgment was not in due course of law. 7 S. & M., 475; 5 How., 157; Const., art. I, §§ 2 and 7. He was not present in court. 49 Miss., 716. He must be personally present to purge himself of the contempt. 10 S. & M., 103. The evidence was illegal. 7 S. & M., 475; 39 Miss., 318.

Frank Johnston, on the same side:

Filed a brief and written argument on the facts, and cited and commented on the following authorities: Black.

Com., book IV, 287; In re Hickey, 4 S. & M., 783; Code, 1871, §§ 410, 411.

G. E. Harris, Attorney General, for the state, insisted that this court has no jurisdiction, and cited, 4 S. & M., 754; 25 Miss., 883; 36 id., 331; Code, 1871, §§ 221, 404, 533, 979, 1400, 1407, 1411 and 1414.

SIMRALL, J., delivered the opinion of the court.

A. A. Shattuck, the sheriff of Colfax county, was fined five hundred dollars for contempt, in failing to produce the body of one Love before the judge of the circuit court at Tupelo in Lee county, in obedience to a writ of *habeas corpus* to him directed.

The writ was issued on the 12th of August, 1875, and was made returnable on the 13th, the next day. It appears that the writ was placed in the hands of one Shipman, the deputy sheriff; the fine was imposed on the 13th of August, and purports to be a final judgment: on the same day an attachment was issued against Shattuck, directing his arrest and production before the judge on the next day, "to show cause why he detains in custody the body of the said D. L. Love." On the 14th, the coroner returned on the attachment, "Executed this writ by arresting A. A. Shattuck, he being sick at the time and in his bed." No action was taken on the attachment.

The preliminary question has been presented and argued by counsel, whether this court can review the judgment of an inferior court imposing a punishment for contempt. Power is inherent in all courts, especially those of superior cognizance to punish for contempts of its authority and dignity. It is essential to the preservation of order and decorum and the proper discharge of the judicial functions. If the breach of decorum, or

the indignity to the magistrates of law are committed in the presence of the court, the trial and judgment are instantaneous and summary, both are accomplished *uno flatu*. The offense is against the court and tends to impede and embarrass the administration of justice. One court cannot punish a contempt committed against another, nor can one court judge of a contempt against another. Hence, in Ex parte Adams, 25 Miss., 886, it was held, that a judge could not discharge a person who had been committed for a contempt of the circuit court. No inquiry could be made, whether a proper case had arisen for punishment or not, whether the judgment was erroneous or not. If the court had jurisdiction and rendered judgment, the prisoner could not be delivered.

In the case of Watson v. Williams, 36 Miss., 341, *et seq.*, the right to review a judgment for contempt on a writ of error, was most elaborately investigated on authority, and the conclusion reached that the court did not have such appellate power. The court closes its opinion with these words: "We have just seen from a review of the decisions of highest authority, both in England and in this country, that by the common law such jurisdiction does not belong to a court of errors and appeals. Hence, our constitution seems not only not to confer, but to deny this jurisdiction to the high court of errors and appeals." Cases cited in 5th Yerg., 456; 1 Black. (Ind.), 166, and 1 Bibb., 600, are to the same effect. Also, Easton *v.* State, 39 Ala., 551.

Although the judgment for contempt cannot be reconsidered on *habeas corpus*, nor reviewed on writ of error, yet, if the court had not jurisdiction, the order would be void. If the act complained of was done in

facie curioe, the offender being in the presence of the court, may at once be punished.

But if the act is alleged to be in disregard of the process of the court, or disobedience of its precepts, or done, not in its presence, then common justice should require that the court should inquire into the facts and afford the offender an opportunity to purge himself.

The practice is to serve a rule on the party to show cause. Hollingsworth *v.* Duane, Wall., 141. If the respondent has not made a true return on the writ of *habeas corpus,* attachment is the proper remedy to bring the party into court to purge himself of the contempt. Worcester *v.* Truman, 1 McLain, 483; Gates *v.* M'Daniel, 3 Port, (Ala.), 356; United States *v.* Dodge, 2 Gall., 313; United States *v.* Green, 3 Mason, 482. In such cases, notice in some form must be given.

It may be, therefore, for want of notice, the sheriff not being in court, but sick at home in Colfax county, that the judgment imposing the fine is void, and that it may be assailed by motion to quash the execution. If void, it cannot be legally enforced; but we have no authority to decide on that point, since we dismiss the appeal for want of jurisdiction.

APPENDIX B

WATSON v. WILLIAMS, 36 Miss. at 341

The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it. In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this State, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts, in the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government. The power to compel the lawless offender, against decency and propriety, to respect the laws of his country, and submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a *restraint* upon the upright, who need no restraint, and a license to the offenders, whom they are made to subdue.

Chancellor Kent, in the case of *Bates*, 4 John. R. 353, in concluding a review of the English cases on this subject, says: "The trust is given to the courts, not for themselves, but for the public, who are deeply interested in the preservation of this power, in its accustomed vigor."

He cites the case of the *Earl of Shaftesbury*, 2 St. Tr. 615; 1 Mod. 144; who was imprisoned by the House of Lords for "high contempt committed against it," and the case brought into the King's Bench, where the court held, that they had no authority to judge of the contempt, and remanded the prisoner. "The court," says he, "in that case, seem to have laid down a principle from which they have never departed, and which is essential to the due administration of justice; this principle, that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined, and more emphatically enforced, in the two subsequent cases of *The Queen v. Patty et al.* 2 Lord Raym. 1105, and of *The King v. Crosby*, 3 Wilson, 188; 2 Black. R. 754."

In Crosby's case, the language of the judges is singularly impressive. Lord Chief Justice De Grey observed, that "when the House of Commons adjudge anything to be a contempt, or a breach of privilege, their adjudication was a conviction, and their commitment in consequence was execution; and that no court could discharge or bail a person that was in execution by the judgment of any other court. . . . That in the case of a commitment by the King's Bench or Common Bench, there was no appeal; that if the courts should abuse their jurisdiction, it would be a public grievance, and redress must be sought from the legislature; that the

constitution had provided checks to prevent its happening. It must be left at large; it was wise to leave it at large. Some persons, some courts, must be trusted with discretionary powers; and, though it is possible, it was in the highest degree improbable, that such abuses should ever happen."

Mr. Justice Blackstone pursued the same train of observation, and declared that all courts—by which he meant to include the two houses of Parliament, and the courts of Westminister Hall—"could have no control in matters of contempt; that the sole adjudication of contempts, and the punishments thereof, belonged exclusively, and without interfering, to each respective court; that infinite confusion and disorder would follow, if every court of the Hall should have power to examine the commitments of the other courts for contempts; that the judgments and commitments of each respective court, as to contempts, must be final, and without control. It was a confidence that might, with perfect safety, be confided in the judges and the houses of Parliament. That the objection, as to abusive consequences, proved too much, because it was applicable to all courts of dernier resort; and general convenience must always outweigh partial inconvenience."

Chancellor Kent, after these citations, adds: "I have cited the opinions of other judges much at large, because I could not hope to improve upon the strength of their observations; and I entertain the most perfect conviction, that the law, as they declared in this case, was well understood, and definitely established as part of the common law of England at the time of our Revolution. Mr. Justice Grose, many years afterwards, thought he did enough to prove the settlement of the law on this

subject, by merely quoting this very able decision of Lord Chief Justice De Grey."

This decision, and the reasoning employed by the judges, is adopted and fully sanctioned, by the Supreme Court of the United States, in *Ex parte Kearny*, 7 Wheat. 38, in an able opinion delivered by Judge Story.

These cases were also considered and reviewed by Cowen, J., in the Supreme Court of New York, and approved as declarative of the common law of England. He says, "that it was agreed in the *Mayor of London's case* (Crosby), 3 Wilson, 188, that in cases of commitment for contempt, by the Lords or Commons, or by any other court of general jurisdiction, no other court had power to interfere, and relieve by *habeas corpus*, or in any other way, because there was no appeal." Blackstone, J., said, "The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court." And De Grey, Ch. J., said, "In case of a commitment by this court, or the King's Bench, there is no appeal." *The People v. Nevins*, 1 Hill, N. Y. R. 164-5. See the late case of *Stockdale* v. *Hansard*, 9 Adolphus & Ellis, 1; 36 E. Com. L. R. 13.

"The right of punishing contempts by summary conviction, is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our State Constitution. The discretion involved in this power, is in a great measure arbitrary and undefinable, and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.

"The known existence of such a power, prevents in a thousand instances the necessity of exerting it, and its obvious liability to abuse, is, perhaps, a strong reason why it is so seldom transcended. This power extends not only to acts, which directly and openly insult or resist the powers of the court, or the persons of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court. 4 Black. Com. 280; 2 Hawk. Pl. Cr. b. 2, c. 22; 1 Com. Dig. Attachment, A.

"The officers of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence, or abuse in their official capacity. 1 Bac. Abr. tit. Attachment; 2 Hawk. tit. Attachment; 3 Atk. 268."

Per Senator Platt, in *Bates v. Lansing*, 9 John. R. 415-16.

The same doctrines of the common law are discussed and admitted, in *Hollingsworth v. Duane*, reported in Wallace, C. C. R. 77.

So in Mississippi, the power of the courts to fine and imprison for contempt, as a necessary incident of judicial power, independent of statutory enactment, inherent in the very nature of their organization, and derived from the constitutional provision which gave them being, *ex necessitate rei*, has been repeatedly recognized by her judicial tribunals. In *Lewis v. Garrett's Adm'r.* 5 How. Miss. R. 453, the doctrine is clearly stated and enforced, both upon principle and authority, by Judge Trotter. So in *Vertner v. Martin*, 10 S. & M. 103. The power of the Probate Court, to imprison by an attachment, for a contempt, an administrator, for failing

to pay a sum of money, which he had been previously ordered to pay, was sustained, and Walker's R. 310, cited as authority for such proceeding.

This case was a writ of error to the High Court. No opinion was expressed, however, as to the power or jurisdiction of the High Court, on the subject of contempts against other jurisdictions.

And in the case of *Adams*, 25 Miss. R. 883, before Justice Yerger, on *habeas corpus*, these doctrines are ably discussed, the authorities reviewed, and the same conclusions announced.

In Kentucky, in the case of *Johnston v. Commonwealth*, 1 Bibb's Kentucky R. 598, this subject is discussed with reference to the power of the Court of Appeals to review judgments and orders for punishing contempts in other jurisdictions, and denied. After reviewing the doctrine of the common law on this subject, Chief Justice Bibb thus concludes his able judgment:—

"The inconveniences which might result from sustaining writs of error and appeals from orders for punishing contempts are worthy of great consideration. We ought, indeed, to weigh well the consequences, before we give a deliberate sanction to a procedure never once recorded in juridical annals, from the earliest periods down to the present day, except in the two cases just cited. The great purposes for which courts are intrusted with the power of punishing contempts demand a speedy and summary proceeding, not consistent with the delays consequent on writs of error and appeals. If, free from the apprehension of immediate punishment, the contemptuous witness, in the face of the court, and in the very act of trial, might paralyze the hand of justice by refusing to give evidence, the poison would circulate

through every artery of the judicial system. In fact, the rights, liberty, and property of the whole community are immediately involved, and interested in the support of the constituted authorities. What are laws without the means competent to secure and enforce a due obedience?

"To this end, a power in courts of justice to suppress contempts and disobedience to their authority, by immediate punishment, is essentially necessary, and results from the first principles of judicial establishments. Laws are necessary to the good order of society. Courts are ordained by the laws as necessary for their due administration. Hence, due respect for the courts of justice is as necessary as a regard for the laws themselves.

"For, when once such respect is lost among the people, the authority of the court is at an end. And that court is impotent and contemptible indeed whose power to punish a contempt to its authority, depends upon the discretion of a superior.

"It seems to be an established principle of law that one court cannot punish a contempt committed against another court. Intimately related to this is another sentiment,—that one court cannot judge of a contempt committed against another. In fine, it seems necessary to the very existence of a court, in the healthy exercise of its powers, that it should have the exclusive jurisdiction to judge of contempts to its authority.

"But it may, perhaps, be asked, if each court is suffered to exercise the power of punishing contempts, without the control and revision of any other court, where is the security of the citizen against the arbitrary oppression of the judge, by a wilful infraction of the

law? It is answered, that the citizen finds security in his own correct demeanor; in the great lenity and unwillingness which has generally been remarked in courts to resort to this exercise of their powers; but above all, in that responsibility which the judge owes to the assembled representation of the country, for any corrupt or wilful and arbitrary abuse of his power.

"It is the boast of our government, that no officer, however exalted his station may be, is above the law; neither can he indulge a wild, arbitrary, or licentious disposition, without responsibility."

Government cannot be administered without committing powers in trust and confidence. The exercise of discretion must be intrusted by the people to some agents, in matters of this character. And it seems to us to be safer and more satisfactory, under our system, to leave it in the hands of the respective courts, immediately deriving their authority from the people, and amenable to the public for its just and wise exercise, than to place it in the hands of an appellate tribunal, removed, in a great measure, from their scrutiny as well as their direct authority.

Whether considered, therefore, with reference to the protection of the authority and just power of the courts, or with regard to the protection of the liberty of the citizen against the unjust and tyrannical exercise of power, a due regard for the security of all will be best promoted, by leaving the whole subject of contempts to the courts respectively, without interference from this court.

So, in Tennessee, in the case of *Andrew L. Martin*, 5 Yerger, 456, the same doctrines are announced as in Kentucky, by Catron, J., and powerfully enforced, de-

nying the right of appeal or writ of error to serve judgments for contempts when the court has jurisdiction.

So, in Indiana, in the case of *The State v. Tipton, Sheriff*, 1 Blackf. R. 166, the writ of error was dismissed, —the court holding that courts of record have exclusive control over charges for contempt; and their conviction or acquittal is final and conclusive. "This great power," says the court, "is intrusted to these tribunals of justice, for the support and preservation of their respectability and independence; it has existed from the earliest period to which the annals of jurisprudence extend; and except in a few cases of party violence, it has been sanctioned and established by the experience of ages,"—referring to English and American cases, already cited.

And, in Illinois, in the case of *Clark v. The People*, Breese R. 266, the same principles are held by the Supreme Court of that State.

Indeed, in the absence of any constitutional or statutory regulation on the subject, it is believed the authorities are uniform on this point.

Upon examination of our constitution and laws, we are unable to perceive any authority for the assumption of jurisdiction in such cases.

The constitution says, "The High Court of Errors and Appeals shall have no jurisdiction but such as properly belongs to a court of errors and appeals." To ascertain what jurisdiction properly belongs to a court of errors and appeals, reference must be had to the system whence we have derived the great body of our unwritten laws,—the common law of England. We have just seen—from a review of the decisions of highest authority, both in England and this country—that, by

the common law, such jurisdiction *does not properly belong to a court of errors and appeals.* Hence, our constitution, seems not only, not to confer, but to deny, this jurisdiction to our High Court of Errors and Appeals.

The power in question is one absolutely necessary to enable the Probate Court to protect, preserve, and administer the estates of decedents, and to save the property of infants from waste and spoliation by unprincipled men, who may have obtained the management of either, by fraud or imposition, or without sufficient security. If, for every order or decree made by that court, requiring executors, administrators, or guardians, to make returns, or file inventories, or do or perform any other duty which the court, under the law, may and ought to require, and imposing penalties for disobedience, such executor, administrator, or guardian, may take an appeal, and disregard the order, estates could never be administered, and the appointment of a guardian would operate to the divestiture of the estate of the ward; in many cases, in favor of the unprincipled guardian.

Our laws are not thus deficient: while they amply protect the liberty and rights of the citizen, they as amply provide for the prevention and punishment of the wrongs he may seek to inflict.

Let the appeal be dismissed, for want of jurisdiction in this court.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,257

R. W. BOYDSTUN, JR.

V.

STATE OF MISSISSIPPI

BRADY, Justice:

This is an appeal from the Circuit Court of Winston County, Mississippi, wherein the appellant, R. W. Boydstun, Jr., was found guilty of direct contempt of court and was sentenced to serve a term of thirty days in the Winston County jail. From that judgment this appeal is taken.

On July 15, 1970, the appellant, a member of the Winston County Bar, appeared before the Circuit Court of Winston County, Mississippi, acting as his own attorney, in regards to an appeal from a plea of not guilty in a justice of the peace court to the offense of improper parking on a public thoroughfare. The appellant first filed and presented a motion to dismiss the cause, and after this was overruled the appellant presented a second instrument in his personal handwriting which was styled, "Motion for the Honorable Circuit Judge to Recuse Himself." This motion contained the following:

1. Said Judge has exhibited strong personal animosity toward Defendant and cannot give Defendant a fair trial.

2. The prosecuting witness, Sheriff Fred Sloan, and District Attorney G. Jyles Eaves, who took an overly active part in the recent campaign for re-

election of the Honorable Judge Perry and the said Judge made a statement to the Grand Jury in the presence of all petit jurors to the effect that Fred Sloan is the greatest sheriff he has ever known.

The circuit judge then informed the appellant that the motion contained language and statements which were contemptuous and announced to the appellant that he would have opportunity to prove or explain the statement or he would be held in contempt and sentenced for the contempt.

The appellant then requested that he be allowed to amend his motion and the court granted permission for him to file anything further that he desired. The appellant then seated himself in the courtroom and in his own handwriting prepared and presented an amended motion styled, "Amendment for Motion for Judge to Recuse Himself from Hearing Said Cause." This motion, as the one preceding it, was duly filed by the circuit clerk on July 15, 1970. This amended motion contained a further reference to the statement attributed to the circuit judge in his address to the grand jury to the effect "that you have one of the best, if not the best, sheriff in the State of Mississippi," which statement the appellant claims he transcribed during the presentation some three days before and was now directly quoting from those notes. The circuit judge claimed that the statement was correct but for the addition of the phrase, "if not the best," and cautioned the appellant that his motion was grounded in hearsay and not in fact. Appellant was unable to get any witnesses to testify who may have heard the statement as he had recalled it, though there were some thirty trial jurors, twenty grand jurors and other spectators, witnesses,

members of the bar and officers of the court present at the time the statement was made by the court.

The appellant then stated that the motion to recuse was handed to the judge personally without publicity, and that no contempt was intended and reiterated his feelings that "the court had a certain amount of animosity toward the defendant." The district attorney then made a statement, which was transcribed by the court reporter, that the appellant had made statements inconsistent with the judge's remarks complained of and had failed to explain these inconsistent statements.

The circuit judge then stated that the appellant's offer to apologize, which was included in the amended handwritten motion for the judge to recuse himself, was totally inconsistent with the latest statements made by the appellant which did, in fact, compound the contempt. The judge then found R. W. Boydston, Jr. to be in direct contempt and sentenced him to a term of thirty days in the Winston County jail. From that judgment and sentence this appeal is taken.

The appellant assigns as error that the Honorable Circuit Judge of the trial court erred in his holding that any of the language or matter contained in the motion of the defendant for the Honorable Judge to recuse himself was contemptuous, and in adjudging the defendant to be in contempt of court and sentencing him to serve thirty days in the Winston County jail.

Section 165 of the Mississippi Constitution which deals with matters coming before a circuit court judge for which he should recuse himself states in part as follows:

> No judge of any court shall preside on the trial of any cause, where the parties or either of them,

shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. . . .

Although Mississippi Code 1942 Annotated section 1152 (1956) requires that "all such appeals shall be tried on the record . . . ," which we have followed in this cause, nevertheless we also take judicial knowledge of that which is common knowledge and which has transpired in the circuit and supreme courts of this state. We note that there have been or are now pending in the circuit courts, federal court of the northern district of Mississippi and in this Court matters involving litigation relating to the Circuit Judge of Winston County and this appellant.

It is the opinion of this Court that, although the trial judge may properly rule on his own disqualification to hear a case, nevertheless in this specific instance where this particular appellant is a party to the litigation before this particular circuit judge, the circuit judge should have recused himself because of the ill will and animosity exhibited by both parties, which possibly stems primarily from appellant's unsuccessful attempt to defeat the present circuit judge. *Barnes v. State*, 220 Miss. 248, 70 So. 2d 920 (1954). It is the opinion of this Court that this particular situation falls within the meaning of the phrase in section 165 of the Mississippi Constitution, to-wit: "[O]r where he may be interested in the same." It is further the opinion of this Court that from the record, the motion to recuse, and the amendment thereto, sufficient proof is wanting to merit a contempt judgment. The wording of the appellant's motion that the circuit judge recuse himself under the well established circumstances, in the opinion of this Court is not sufficient to bring it under the decision in

Ex Parte Redmond, 156 Miss. 582, 126 So. 485 (1930): Even though the motion to recuse may not have been well taken, it would not have constituted a direct contempt.

While these proceedings took place only before the court, the circuit clerk, the sheriff and the district attorney, nevertheless such grievous episodes of this nature are not calculated to generate public respect for the bar or bench. Fortunately most lawyers and judges in this state treat each other with respect, and decorum prevails in our temples of justice. This opinion does not in any manner inhibit trial judges and chancellors from the exercise of the duty and right to see that their respective courts are operated with dignity and decorum.

For the foregoing reasons the judgment of the circuit court is reversed and the appellant is discharged.

REVERSED AND APPELLANT DISCHARGED.

GILLESPIE, P.J., AND JONES, PATTERSON AND SMITH, JJ., CONCUR.